No. 12,099

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. GRAHAM,
Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD (a corporation),
Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's brief is but a denial of plaintiff's evidence in the record showing:

(1) That rescission of the release was effected;

(2) That rescission was timely;

(3) That the release was the result of mutual mistake; or

(4) Fraud;

(5) Plaintiff's right to rescind;

(6) That plaintiff did not know about his permanent disability at the time he executed the release; and

(7) That the settlement, in the light of plaintiff's permanent injury, was unfair and inequitable.

These points will be discussed separately and briefly in the following paragraphs. However, it should be noted that these same points are fully covered by the points raised in appellant's opening brief.

I.

> On page three of appellee's brief it is stated that "There is no record in the case that he (Appellant) either offered to rescind or was able to offer to rescind at any time."

and cites the record (183)* to support this. In the discussion cited in the record, the trial Court and counsel evidently were of the opinion that it was a condition precedent to a valid rescission that plaintiff had to *actually produce and tender to defendant the sum of $1050 in cash.* Obviously this is not the law, since plaintiff was not obliged to tender cash. His offer was sufficient. As a matter of fact, defendant is *estopped* to deny a valid tender since no objection was raised thereto.

Doak v. Bruson, 152 Cal. 17, 20;

Allen v. Chatfield, 172 Cal. 60, 62;

Hassom v. City of Long Beach, 83 Cal. App. (2d) 745;

California Code of Civil Procedure, section 2074.

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*Unidentified arabic numerals in parentheses refer to the pages of the record.

> "A tender is not necessary where the declarations of the offeree are such as to indicate that the actual offer of money will be rejected; the law does not require a man to do a vain and fruitless thing; a strict and formal tender is not necessary where it appears that if it had been made it would have been refused (Hoppin v. Munsey, 185 Cal. 678, 685 (198 Pac. 398))."
>
> *Hassom v. City of Long Beach,* 83 Cal. App. (2d) 745, 750, 751.

Under such reasoning, from the time of defendant's answer, setting up the release in bar to plaintiff's complaint, tender would have been a "fruitless" gesture, since by defendant's answer was revealed its intent to steadfastly hold to the terms of the release.

A. Rescission was made.

Counsel for defendant, at this point of the case, now appear to *crawfish* from a stipulation entered into regarding the receipt of the notice of rescission.

The record (261) as shown in appellee's brief, page 5, shows that defendant's counsel stipulated that defendant received the letter in question (Plaintiff's Exhibit No. 5) (261-262); that the letter itself states that the notice of rescission and offer to restore were enclosed therein; that defendant's counsel made no objection that said notice and offer were not so enclosed, but, by his stipulation agreed to the receipt of *both.* Consequently, there can be no doubt that both counsel and defendant were notified of plaintiff's rescission and offer to restore the $1050 to the defendant.

Because counsel for defendant choose to stand upon such a technicality, thereby reneging on the stipulation which all counsel understood to mean receipt, not only of the *letter,* but also its *enclosures,* the Court's attention is directed to Section 1963(20) of the California Code of Civil Procedure, setting forth the rebuttable presumption: "20. *That the ordinary course of business has been followed.*"

Certainly, *in the ordinary course of the business of a law office, an enclosure mentioned as "enclosed" in a letter will accompany the letter to its destination.* Under the cited code section, this is *presumed* to have been done in the ordinary course of business until rebutted by competent evidence. Counsel, at the time of entering into the stipulation in question, did not *then* state that the *enclosures* had not been received. It follows therefore, that there is no evidence in the record to rebut this presumption, despite counsel's attempt to do so at this late date. Hence there can be no dispute but that defendant received the notice of rescission and offer to restore. Consequently, there is substantial evidence in the record for the Court to legitimately infer that said notice and offer were sent by the plaintiff and received by the defendant.

The document itself is unnecessary, because, even if set forth verbatim in the record, it would only set forth the ultimate fact of notice of rescission and offer to restore the consideration to defendant. This fact is proved by the stipulation and the presumption mentioned above. Hence *Winstanley v. Ackerman,* 110 Cal. App. 641, cited by appellee, is not controlling or

in point. Further, this case may be distinguished from the instant case on the ground that there was *no* evidence of any kind in the *Winstanley* case from which a *tender* could be inferred by the Court. In the instant case the record justifies the inference of receipt by defendant of the notice of rescission and offer to restore the consideration to defendant.

B. There is substantial evidence to justify an inference of plaintiff's ability to pay pursuant to his offer to restore the consideration.

The evidence in the record speaks for itself:

(79) "Q. Also, I neglected to ask you yesterday, at the time you offered to return the $1050 to the defendant railroad, did you have that amount of money to repay them?

A. I did, yes.

Q. And was that offer made in good faith?

A. It was."

(241) "Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad?

A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man? (money)

A. Yes—well, yes.

Q. What was the agreement?

A. In the event I couldn't get it all together, they would help me out on it."

"Q. (By Mr. Emmons) At the time that you executed this release, did you have some property up there in Searchlight?

A. I did.
Q. Did you own that property?
A. I did.
Q. Do you still own it?
A. I still own it.
Q. Did you own it on the date that you rescinded this release?
A. Yes.
Q. Now, is that property now, or was it then, worth $1000 or more?
A. Oh, yes.
Q. And could you have obtained more than $1000 for it?
A. I could have gotten that without much trouble.
Q. And could you have borrowed $1000?
A. Oh, yes."

There is no conflict in the evidence in regard to plaintiff's ability to pay should the occasion demand it. And, if there be a conflict, the foregoing evidence is sufficient to justify the inference of such ability on this appeal.

II.

PLAINTIFF'S RESCISSION WAS TIMELY AND HE WAS NOT GUILTY OF LACHES.

The question whether a rescission has been *timely* is one of fact. So too is the question of *excuse* or *delay* in rescinding.

King v. Mortimer, 83 A.C.A. 189, 195;
Cahill v. Superior Court, 145 Cal. 42.

Plaintiff was first aware of his permanent injury on February 13, 1946 (61). On August 30, 1946 he filed suit herein (2). On September 25, 1946 defendant filed its answer herein setting up as a bar to plaintiff's action, the release in question (8).

On November 25, 1947 plaintiff's counsel, on behalf of the plaintiff, mailed to counsel for defendant, a notice of rescission and offer to restore consideration to defendant (262). This offer to rescind was received by counsel for defendant as an *enclosure* of the letter (Plaintiff's Exhibit No. 5) admittedly received by counsel (261). The trial date was August 17, 1948 (11).

Section 2074 of the California Code of Civil Procedure provides:

> "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, *is, if not accepted, equivalent to the actual production and tender of the money, instrument,* or *property.*" (Emphasis added.)

Section 2076 of the same code provides:

> "The person to whom a tender is made *must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it;* * * *" (Emphasis added.)

Consequently, defendant had from the date of receipt of plaintiff's letter, enclosing his notice of rescission and offer to restore the $1050 to defendant,

until the trial date—*a period of eight and one-half months*—to raise any objections it might have had to the sufficiency of plaintiff's tender. Failing to do so, it is estopped to do so at this time.

> "The question of promptness in the act of rescission, knowledge of the right to rescind and necessity to restore are all questions of fact * * *"
> *King v. Mortimer,* 83 A.C.A. 189, 195.

There is no evidence that plaintiff was guilty of laches in rescinding after suit was filed; nor is there any evidence that by reason thereof defendant suffered damage or prejudice as a result of the time which elapsed between the signing of the release and of rescission.

Hind v. Silva (C.C.A. 9th), 75 F. (2d) 174;
Vice v. Thacker, 30 Cal. (2d) 84;
Carr v. Sacto Clay Prod. Co., 35 Cal. App. 439, 170 Pac. 446;
Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549, 129 P. (2d) 435;
O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334.

The question of retention of the consideration is *moot* for two reasons: (1) There was a valid rescission to which defendant offered no objection for a period of eight and one-half months; and (2) that plaintiff was *entitled* to retain the sum of $1050 received from defendant as compensation for property damage and *known* personal injuries.

III and IV.

THERE IS FACTUAL EVIDENCE OF MUTUAL MISTAKE OR FRAUD.

Reference is made to the statement of facts found on pages 3 through 7 of appellant's opening brief for a resume of these facts, with citations to the record to substantiate them, which amply justify an inference of either a mutual mistake or a deliberate fraud.

There is no dispute but that plaintiff had a pre-existing, non-disabling disc condition prior to the accident. Nor can there be a dispute as to the exacerbation of this condition into a *permanently* disabling one (236). Although the pain was severe, *plaintiff did not know* that his injuries were *permanent.* He relied upon Dr. Morrison's assurance that he would be "all right within 30 to 60 days" when he signed the release, believing that his pain and suffering were temporary only.

Therefore, it appears that both plaintiff and defendant's Dr. Morrison shared a *mistaken belief* that the condition of plaintiff's spine was *not serious,* but was such that any temporary disability resulting therefrom *would be of reasonably short duration.* On this showing, relief from the release must be granted.

Union Pac. R. R. Co. v. Zimmer, 87 A.C.A. 611, 617 (197 Pac. (2d) 363);
Steele v. Erie R. Co., 54 F. (2d) 688.

Counsel, on page ten of appellee's brief, advance the proposition that Dr. Morrison's statements to plaintiff "did not amount to any representations upon which

appellant was entitled to rely". That this is not a correct statement is disclosed by the rule set forth in the cases cited by appellant on pages 25, 26 and 27 of his opening brief, viz., that *a release for personal injuries is invalid where executed as a result of the attending surgeon's erroneous or false opinion concerning the physical condition of the releasor.*

If, under these facts, defendant denies the existence of a mistake on the part of defendant's Dr. Morrison in the diagnosis of plaintiff's injury, the only inference remaining is that the diagnosis was *fraudulent.*

Union Pac. R. R. Co. v. Zimmer, supra;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549, 558, 117 A.L.R. 1030.

V.

PLAINTIFF'S REAL INTENT IS SELF-EVIDENT.

By signing the release in question, the plaintiff's intent was to release the defendant from further liability as to a temporary injury arising from the accident, as was indicated by the statements made to him by defendant's Doctor Morrison, upon whom he relied.

Berry v. Struble, 20 Cal. App. (2d) 299, cited by appellee, is readily distinguishable from the instant case upon its facts. In the *Berry* case, there was no contention by the rescinding party that the facts attending the signing of the release gave rise to a mutual mistake or fraud. Here, the facts strongly indicate

both, hence it becomes a question of fact for the jury to determine what the intention of the parties was at the time of executing the release. Also, the release construed in the *Berry* case contained an express provision as to "all unknown and unanticipated injuries and damages" resulting from the accident. There is no such provision in the release signed by plaintiff.

Hudgins v. Standard Oil Co., 136 Cal. App. 44;
Leff v. Knewbow, 47 Cal. App. (2d) 360;
Matthews v. A. T. & S. F. R. Co., supra;
Megee v. Fasulis, 57 Cal. App. (2d) 275, 288.

In *Pacific Greyhound Lines v. Zane,* 160 Fed. (2d) 731, cited by appellee, *this court* (C.C.A. 9) construed a release which *expressly stated* that it waived the provisions of California Civil Code section 1542. Consequently, *this Court* held that in the absence of *actual fraud,* this type of release, *expressly mentioning and waiving* section 1542 of the Civil Code was valid. No such waiver is found in the release signed by plaintiff. Hence this case is also distinguished.

In *Union Pacific R. R. Co. v. Zimmer,* supra, a release almost identical to the one in question was construed by the California District Court of Appeal not to be a bar to plaintiff's action under the Federal Employers' Liability Act, that Court stating at page 615:

> "It is well settled, however, that the mere fact that the release is extremely comprehensive in terms, and purports to be a complete discharge from all claims arising out of the accident, and is understood as such by the releasor, will not pre-

vent its avoidance where proper grounds therefor exist. (Tulsa City Lines v. Mains (2 Cir.) 107 F. (2d) 377, 381; Atlantic Greyhound Lines v. Metz (4 Cir.) 70 F. (2d) 166, 168; see also Bonici v. Standard Oil Co. (2 Cir.) 103 F. (2d) 437, 438; Southwest Pump & Machinery Co. v. Jones (8 Cir.) 87 F. (2d) 879; *Great Northern Ry. Co. v. Reid (9 Cir.) 245 F. 86 (157 C.C.A. 382)*; Accord: *Hudgins v. Standard Oil Co., 136 Cal. App. 44 (28 P. (2d) 433)*; Rider v Kansas City Terminal Ry Co., 112 Kan. 765 (212 P. 678).)" (Emphasis added.)

Substantially the same general form of release was considered in the following cases and held to be general. Defendant herein is a party to two of these cases and the *identical* form of release is therein construed and avoided.

Backus v. Session, 17 Cal. (2d) 380, 110 Pac. (2d) 51;

O'Meara v. Haiden, supra;

A. T. & S. F. R. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Matthews v. A. T. & S. F. R. Co., supra.

VI.

THE UNCONTRADICTED EVIDENCE IS THAT THE DISABLING CONDITION OF THE DEGENERATIVE DISC WAS CAUSED BY THE ACCIDENT OF JULY 6, 1945.

Reference is made to Section V, page 9, of appellant's opening brief for a further discussion of this point.

Briefly, the evidence shows: that prior to the accident plaintiff was in good health (86); that he had been able, up to the time of the accident, to perform the duties of his job (87); that after the accident he *painfully* drove his car to his home (110; 243); that thereafter *his wife* drove the car (116; 118; 122); that he left defendant's hospital because the doctors there were not helping him (123); that he did not return to work, because unable to do so, until the day before, or the day of signing the release (58); that thereafter, off and on, for forty-five days he worked on passenger service with considerable pain and difficulty (59); that both medical witnesses who examined plaintiff testified that he was unable to perform his regular duties because of the exacerbation caused by the injury and that his condition was permanently disabling (148, 159, 169-170, 232-233, 236).

This evidence indicates conclusively that plaintiff suffered a permanent disability as a result of the accident.

That plaintiff was aware of the severe pain and impairment of his movements at the time of signing the release is undisputed. Counsel, however, chosse to ignore the fact that Dr. Morrison at that time had advised plaintiff that he would be "all right" and could "return to work" and would be "all right within 30 to 60 days". Nor did plaintiff realize that this pain was a "flare-up" of a preexisting disc condition, because Dr. Morrison did not advise him of this situation and instead concealed it from him.

Dr. Niemand explains the plaintiff's present permanent difficulty in stating (169-170):

> "Q. (By Mr. Baraty.) No, as a result of this accident here, to what extent would a rupture of a degenerative disc disable a man like that?
>
> A. Well, suppose he had to carry out a 200 pound weight or something; he could lift that weight in carrying it out, but he would be incapacitated in lifting. He would increase the degeneration and increase the pain. He could do something that came up like that, but all he would be doing would be to increase the disability that he has, and therefore he would be incapacitated for any manual labor. So as a sensible process, or shall we say, a scientific process, you would not subject a man like this to that type of work or even to motion. I mean, every minute there is increasing the disability."

If defendant's position in this regard is well taken, at most it presents only a conflict in the medical testimony which should be resolved by the jury—not by the trial Court as a matter of law. Such a conflict, if any there is, must be resolved in favor of appellant herein.

VII.

THE CONSIDERATION PAID TO PLAINTIFF UPON SIGNING THE RELEASE WAS NOT FAIR OR EQUITABLE IN THE LIGHT OF PLAINTIFF'S PERMANENT DISABILITY.

The consideration received by plaintiff was adequate for the temporary pain and suffering which plaintiff believed, and bargained for, at the time of

signing the release, would not extend beyond 30 to 60 days from the time he was so informed by Dr. Morrison.

Plaintiff does not dispute the "fairness" of the amount received when limited to the conditions which plaintiff was led to believe existed at the time he signed the release. However, when viewed in the light of plaintiff's real and permanent injury it is manifestly inadequate and inequitable.

The question whether plaintiff's "flare-up" was severe or ordinary—whether temporary or permanent—was a matter of fact which should have been submitted to the jury.

Callen v. Penn. Ry. Co., 68 Sup. Ct. 296, 332 U.S. 625, 92 L. Ed. 235.

Dr. Niemand's testimony establishes that plaintiff's condition prior to the accident was non-disabling; that at the time of signing the release he was permanently disabled and any subsequent labor on his part would be a further exacerbation thereof.

Dr. Niemand testified:

"Q. Would this man have any preexisting condition which would be disabling prior to the time of this accident?

A. No, not necessarily; he could have a degenerated disc without it necessarily being very disabling. It might not disable him. We could say that he might have—just by tying your shoelace like this (indicating), and you could fall off onto the floor, like I have had them, and sit on the floor and get a disc fractured. *Then it*

might not bother you for ten years, until some acute thing really starts more of that cracking together of the vertebrae (indicating). *That is what happened in this case.*" (148.) (Emphasis added.)

"A. In other words, this man could have had such a disability giving him very little trouble until an acute blow (indicating) which flares it up in a marked degreed." (159.)

See also pages 169-170 of the record.

The so-called "evaluation" of the plaintiff's flare-up by Dr. Soto-Hall (page 14, appellee's brief) is based upon facts which are not in evidence or substantiated by the record, viz.:

"the fact that he was able to carry on for several months * * * if a man is able to continue with regular normal work for several months * * * from the fact that he went back to work, I would say that his flare up wasn't too great; but I have granted that he could have a flare up as a result of the accident." (239.)

The evidence shows that plaintiff did not return to work until on or about the date of signing the release (58); that he worked intermittently thereafter on a passenger job—not a freight train (128); that he worked for a period of only forty-five days (58, 59, 189); that during said period, he worked with great difficulty and pain and was unable to perform his duties because of the injury (58, 59).

Therefore, the foundation for Dr. Soto-Hall's "evaluation" of plaintiff's flare up rests upon facts

not in the record. Furthermore, this doctor testified that the fact that plaintiff, if he did, returned to work at all after the accident would not indicate there was *no* exacerbation of his injury, but "would be *helpful* in evaluating the *severity* of the exacerbation." (239.)

The question of the extent of plaintiff's exacerbation should have been submitted to the jury.

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549;

Callen v. Penn. R. Co., supra.

VIII.

The trial Court's opinion set forth in appellant's brief, page 15, shows that Court's erroneous basis for its ruling, viz., that there was "no question of fact that requires resolution by the jury" and "there is nothing for the jury to pass upon".

Unquestionably, the trial Court completely disregarded the law set forth in the *Callen* case in directing the verdict for the defendant. The questions of fact presented by plaintiff should have been submitted to the jury, with proper instructions, and counsel given an opportunity to argue the issues of mutual mistake, fraud, rescission, invalidity of the release, and the nature and extent of plaintiff's injury. Failure to do so was prejudicial error.

SUMMARY.

The failure of defendant to attempt to distinguish the facts of the instant case with the doctrines set forth in the *Callen, Wilkerson v. McCarthy, Union Pac. R. Co. v. Zimmer,* and other cases cited by appellant in his opening brief is significant, but understandable, because they establish conclusively that the trial Court committed reversible error in failing to submit to the jury the issues of fact presented herein.

CONCLUSION.

Because of the entire absence of conflict in the evidence to refute the issues of (1) mutual mistake; (2) applicability of section 1542 of the California Civil Code to the facts herein; (3) fraud and (4) rescission, if necessary; (5) validity of the release and (6) the nature and extent of plaintiff's disability, appellant respectfully urges that this Honorable Court instruct the District Court to order a new trial and to submit to the jury the single issue of the extent of plaintiff's damage, or, at least, to submit to a jury the questions of fact set forth herein.

Dated, San Francisco, California,
April 25, 1949.

Respectfully submitted,
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